IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/08/2002

CORAM

THE HONOURABLE MR.JUSTICE P.SHANMUGAM
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

CRIMINAL APPEAL NO.40 of 1995

1. Thalavai
2. Arumugam .. Appellants

-Vs-

The State represented by
The Sub Inspector of Police,
Cheranmahadevi Police Station,
Tirunelveli Kattabomman District. .. Respondent

This Criminal Appeal is preferred under S.374 (2) of Code of Criminal Procedure against the judgment and sentence passed by the District Additional Sessions Judge, Tirunelveli Kattabomman District in S.C. No.186 of 1993 dated 6.1.1995.

!For Appellants : Mr.P.N.Prakash
for M/s.Anand, Abdul and
Vinoth Associates

^For Respondent : Mr.S.Jayakumar
Additional Public Prosecutor

:JUDGMENT

M. CHOCKALINGAM, J.
The appellants have preferred this appeal from the judgment and sentence passed by the learned District Additional Sessions Judge, Tirunelveli in S.C.No.186 of 1993.
2. The appellants herein ranked as A-1 and A-2 respectively along with A-3 one Arumuga Thevar faced a trial before the Court of Sessions, where the first appellant was charged under S.302 of I.P.C., while the second appellant was charged under S.302 read with S.109 of I.P.C., and the third accused was charged under S.302 read with S.114 of I.P.C. The learned Additional Sessions Judge found both the appellants guilty on the above charges and awarded life imprisonment, while he acquitted the third accused.
3. The case of the prosecution can shortly be stated as follows:
P.W.1 Ramasamy Pillai was residing at Cheranmahadevi. His daughter P.W.2 Puspam was given in marriage to the deceased Velu. The deceased Velu

and the second appellant/A-2 were brothers. The first appellant/A-1 is the son of A-3. The second appellant had illicit contact with a lady by name Lakshmi in Mukkoodal. The deceased Velu questioned the second appellant over the same. One day, Velu beat the said lady in a public bus stand. Aggrieved over the same, all the three accused damaged the house of Velu's first wife. On an another occasion Velu found all the three accused with the said Lakshmi and questioned about the same. The first accused made an attempt to cut the deceased Velu, but it fell on the second accused. On a complaint, a case was registered against the accused, and the criminal case was pending. Thus, there prevailed enmity among them. A-2 with the help of A-1 and A-3 decided to murder Velu, and they planned for the same. On 2.4.1991 at about 2.30 P.M., while Velu was spea king with P.W.1 Ramasamy Pillai and P.W.2 Puspam and others near the house, A-1 and A-3 from the other bank of the Canadian Channel called Velu by shouting at him and using filthy language. The deceased Velu crossed the Canadian Channel. A-1 was armed with a Velkambu and A-2 was armed with a knife. The deceased Velu, who went nearby, on seeing this, turned and was about to return. Immediately, A-1 uttered "It was he who attacked. Cut him. Fist him." So saying, he stabbed Velu with M.O.1 Velkambu. The whole occurrence was witnessed by P.Ws.1 to 3. On seeing the witnesses running to the place of occurrence, the accused left the scene of occurrence with weapons. P.W.4 Sivasubramanian came to the scene of occurrence immediately after the occurrence. All the witnesses found Velu dead, lifted his body and brought to P.W.1's house. P. W.1 went to Cheranmahadevi Police Station to lodge a complaint. P.W.9 Madhavanpillai, Sub Inspector of Police recorded Ex.P1 complaint given by P.W.1 and registered a case in Crime No.100/91 under S.302 of I.P.C. Ex.P12 First Information Report was despatched to the Court. On receipt of the copy of the First Information Report, P.W.12 Chidambaram, Inspector of Police, proceeded to the scene of occurrence, made an inspection and prepared Ex.P2 Observation Mahazar in the presence of two witnesses and Ex.P19 rough sketch. He recorded the statements of P.Ws.1 to 4. He made the inquest over the dead body of Velu from 9.00 P.M. to 12.00 A.M. and prepared Ex.P20 inquest report. The Investigation Officer sent the dead body to the Government Hospital, Ambasamudram, through P.W.7 Mariappan, a Constable, for postmortem with Ex.P17 requisition. At about 12.15 A.M. the Investigation officer recovered M.O.3 bloodstained brick, M.O.5 bloodstained earth and M.O.6 earth without bloodstain under Ex.P3 mahazar.

4. On receipt of the requisition for postmortem, P.W.11 Dr.Abdul Kareem commenced and conducted the autopsy on 3.4.1991 by 11.30 A.M. on the dead body of Velu and found the following external injuries on the body.

1) A penetrating wound on the left side back of 5th intercostal space 1" lateral to 5th Thoracic vertebra about 5 cm x 3 cm. A probe is passed which one proceeded deep to 15 cm. inside.

P.W.11, the Doctor has issued Ex.P18 postmortem certificate and opined that the deceased would appear to have died of shock and haemorrhage due to penetrating wound in the back of left thoracic. On 8.4.1991 , the appellants/A-1 & A-2 surrendered before the Judicial Magistrate, Srivaikundam. The Investigation Officer made an application seeking police custody for the purpose of interrogation. On an order made by the Judicial Magistrate, Cheranmahadevi, the appellants were taken to police custody at 4.15 P.M. on 15.4.1991, and he enquired them. The appellants 1 and 2 gave confessional statements, which were recorded in the presence of P.W.6 Sivaganapathyvelu,

Village Administrative Officer and the other witness. The admissible portions of the respective confessional statements are marked as Exs.P5 and P7. As stated in their confessional statements, A-1 produced M.O.1 Velkambu, and A-2 produced M.O.2 knife. The Investigation Officer recovered both these weapons under Exs.P6 and P8 respectively. All the material objects were despatched to the Court of Judicial Magistrate. On a requisition given by the Investigation Officer, all the material objects recovered were sent for chemical analysis. The reports of the Chemical Analyst and the Serologist are marked as Exs.P15 and P16 respectively. On completion of the investigation, the Investigation Officer filed a charge sheet against the accused under S.302 read with S.114 of Indian Penal Code.

5. In order to prove the charges, the prosecution has examined P.Ws.1 to 12, marked Exs.P1 to P20 and produced M.Os.1 to 8. When the appellants and the third accused were questioned under S.313 of Code of Criminal Procedure, they totally denied the versions of the prosecution witnesses and have added that they were false. No defence witness was examined. After hearing both sides, the learned Sessions Judge has found A-1 guilty under S.302 of I.P.C. and A-2 under S.302 read with S.109 of I.P.C. and awarded the punishment as stated above, while A-3 was convicted of the charge levelled against him.

6. Arguing for the appellants, the learned Counsel would submit that the lower court should have acquitted the appellants also in respect of the charges framed against them, while it has acquitted A-3 of the charge against him on the same evidence; that according to the prosecution, the occurrence has taken place at about 2.30 P.M., and the case was registered at 3.30 P.M.; that it is admitted by the prosecution witnesses that the police station is situated within a short distance, and under such circumstance, it is highly improbable on the part of the Sub Inspector of Police who registered the case, to state that he waited till the arrival of the Inspector of Police viz. up to 6.00 P.M., and he accompanied him to the scene of occurrence; that this version of the Sub Inspector of Police is falsified by the evidence of P.W.1, who would state that the Sub Inspector came to the place of occurrence at about 4.00 or 4.30 P.M.; that the lower court should have rejected the evidence of the so-called eyewitnesses; that according to the prosecution witnesses, the deceased was also chatting with them inside the house of P.W.1, and on hearing the calling of the accused from the other bank, the deceased Velu went out to the other side of the canal; that taking into consideration the topography of the place of occurrence and that a big mango tree is situated exactly at the back of P.W.1's house, P.Ws.1 to 3 could not have seen the occurrence at all, and in view of the same and apart from that, all the three witnesses who are all relations and interested in the deceased, the lower Court should have rejected their testimonies; that the lower court should have seen that except the unreliable and interested testimonies of these witnesses, nothing was available for the prosecution to connect the accused; that according to the First Information Report, it was A-1, who uttered that the deceased was the person, who attacked them, and hence he should be killed, but P.W.1 has stated in his evidence that it was A-3 who uttered those words; that it is pertinent to note that a criminal case was already pending against the accused party, and hence, the motive attributed to the accused for the commission of the offence was false; that it is an admitted fact that number of houses are situated in and around the place of occurrence, but no one independent witness was examined to prove the crime;

that there was an unexplained delay in the F.I.R. reaching the Court; that no motive is attributed to A-1 to commit the offence; that so far as A-2 was concerned, there is nothing to show that he abetted the offence in question, since there is no proof for active and intentional instigation; that the lower court should have rejected the confessional statement alleged to have been recorded from A-2 and recovery of M. O.2 knife from him for the reasons that Ex.P7 the admissible portion of the confessional statement of A-2 reads that A-2 used knife at the time of occurrence, but even as per the prosecution case, A-2 neither used the knife nor gave any blow, and apart from that, the socalled confessional statements were recorded in the presence of the Village Administrative Officer, which are legally prohibited, and thus, the prosecution has not proved its case against the appellants herein, and hence, the appellants have got to be acquitted of the charges.

7. Vehemently opposing the contentions put forth by the appellants' side, the learned Additional Public Prosecutor would urge that the prosecution has placed sufficient proof indicating that the enmity prevailed between the groups; that the deceased Velu often questioned his brother A-2 on his immoral conduct, and apart from that, A-1 and A-3 were helping him financially, which was also questioned by the deceased Velu, and thus, all the three accused were in inimical terms to Velu, and they planned to murder him; that according to the prosecution, the deceased Velu along with the other witnesses were standing outside and chatting, and at that time, the deceased was called by the accused from the other bank of Canadian Channel; that when Velu was proceeding towards the other side of the canal, all the prosecution witnesses were looking at what was actually happening; that from their evidence, it would be clear that they have actually witnesses the occurrence within a short distance of 20 or 30 feet; that the lower court has correctly accepted their evidence, since it was reliable; that the material objects were recovered only on the confessional statement given by A-1 and A-2, and the same has been clearly proved by the prosecution; that the medical evidence stood in corroboration of the evidence adduced through the eyewitnesses; and that the Chemical Analyst's report and the Serologist's report have also strengthened the prosecution case. Added further, the learned Additional Public Prosecutor that it is true that the prosecution has not examined any independent witness; that it should not be forgotten that the occurrence has taken place at about 2.30 P.M., and hence, all the inhabitants would have kept themselves inside and no one could expect them either to hear the calling of the accused from the other bank or to see the deceased proceeding towards them on such call or the occurrence that followed; that the non examination of the independent witnesses, under such circumstances, would not in any way affect the prosecution case; that there was no delay in registering the case or the FIR reaching the court; that it is not correct on the part of the appellants' side to state that there was no motive for A-1 or A-2, since the prosecution has adduced sufficient evidence to prove the motive; that from the available evidence, it would be clear that without the instigation of A-2, A-1 could not have attacked the deceased, and under such circumstances, there are no merits in the appeal, and the appeal has got to be dismissed.

8. Challenging the finding of the Court of Sessions that the appellants 1 and 2 ranked as A-1 and A-2 respectively, were guilty in respect of the charges levelled against them and directed to undergo the sentence as stated above.

9. In order to prove the charges levelled against the accused, the prosecution has marched P.Ws.1 to 3 as eyewitnesses. All the three witnesses have given a consistent evidence stating that at about 2.30 P.M. on 2.4.1991, themselves and the deceased Velu were chatting in the house of the deceased situated on the southern bank of Canadian Channel; that they heard the voice of the accused calling the deceased in filthy language from the other bank of the channel; that on hearing the same, the deceased proceeded towards the other bank; that on seeing the accused armed with weapons, the deceased turned back to return, and at that time, A-1 who was holding M.O.1 Velkambu gave a blow on the back of the deceased; that all the witnesses who were standing on the southern bank of the channel, witnessed the occurrence; and that on seeing the witnesses, the accused ran away from the place of occurrence. It is true that P.Ws.1 to 3 are close relatives. But on that sole ground, their evidence cannot be rejected, when the same is consistent, natural, reliable and stood the careful scrutiny.

10. The contention of the appellants' side that there was no motive for the appellants to attack the deceased cannot be countenanced, in view of the available evidence adduced by the prosecution through the eyewitnesses and P.W.5 one of the brothers of both the second appellant/A-2 and the deceased. Admittedly, there was a criminal case pending between the parties. The evidence would clearly show that the relationship between the parties was thoroughly strained by number of incidents, which preceded the crime. It is pertinent to note that the case under S.302 of I.P.C. was registered at about 3.30 P.M., while the occurrence has taken place by 2.30 P.M. As contended by the learned counsel for the appellants, there was some delay in sending the First Information Report to the Court of Judicial Magistrate. In view of the available evidence, pointing to the guilt of the accused, the case of the prosecution cannot be rejected on that ground alone. In the absence of any strong circumstance or reason, it would be very difficult to accept the contention of the appellants that the case was not registered at 3.30 P.M., as put forth by the prosecution, but at a later point of time. Thus the court is unable to appreciate or accept the contentions put forth by the appellants' side in that regard.

11. At the time of investigation, P.W.12, Inspector of Police, has prepared Ex.P2 Observation Mahazar and Ex.P19 Rough Sketch. The appellants have not disputed the contents of those documents. As could be well seen from those documents, the place of occurrence is situated within 30 feet from the residence of the deceased and 20 feet from the place of the southern bank of the channel. It is pertinent to note that the occurrence has taken place during day light i.e. 2.30 P.M. It is not in dispute that the accused were already familiar to the witnesses. Hence, there was all possibility and probability for the witnesses to see the whole occurrence. All the three witnesses have consistently spoken to the fact that it was A-1, who gave a severe blow on the back of the deceased with M.O.1 Velkambu.

12. Apart from the above, after the inquest was over, the Inspector of Police sent the dead body along with a requisition for postmortem. Pursuant to the said requisition, P.W.11 the Doctor, has conducted the postmortem, gave a certificate under Ex and opined that the deceased would appear to have died of shock and haemorrhage due to penetrating wound in the back of left thoracic. From the medical evidence, it would be clear that the injury on the back of left thoracic was fatal, and the death would have been

caused instantaneously. All the eyewitnesses have clearly spoken to the fact that immediately after the blow was given, the deceased died at the spot instantaneously. Thus, the medical evidence stands in full corroboration to the ocular evidence, adduced by the prosecution.

13. Pursuant to the confessional statement given by A-1, M.O.1 Velkambu was recovered by the Investigation Officer in the presence of P.W.6 Village Administrative Officer and the other witness under Ex.P6 mahazar. The evidence of P.W.6 with regard to the recording of confessional statement from A-1 and recovery of M.O.1 Velkambu under Ex.P6 mahazar remains unshaken in the cross examination. This piece of evidence as to the confessional statement given by A-1 leading to the recovery of M.O.1 Velkambu used at the time of occurrence would prove the nexus between the first appellant/A-1 and the crime in question. All the material objects recovered by P.W.12 Inspector of Police during investigation were subjected to chemical analysis as found in Ex. P15 Chemical Analyst's Report. Ex.P15 Chemical Analyst's report and Ex.P16 Serologist's report would reveal that the blood group found in M.O.1 Velkambu used by the first appellant at the time of occurrence to attack the deceased, tallied with all other bloodstained material objects. Thus, the prosecution by adducing acceptable and sufficient evidence as stated above, has proved that A-1 has stabbed the deceased Velu with M.O.1 Velkambu and caused instantaneous death, as alleged by the prosecution.

14. From the available evidence, it would be very clear that at the time of the occurrence, Velu was in his residence situate on the southern bank of Canadian Channel, and on the call made by the accused, he went over to the other bank, where A-1 was armed with M.O.1 a weapon of murder. It is pertinent to note that there is nothing to indicate that A-1 had his residence nearby, or there was any quarrel or provocation for him to attack the deceased. Under such circumstances, the crime committed by the first appellant would squarely fall under S.302 of Indian Penal Code. Hence, the lower Court was justified in finding the first appellant/A-1 guilty under S.302 of I.P.C.

15. So far as the second appellant/A-2 is concerned, he was charged for the abetment of the murder committed by A-1. No one of the witnesses have deposed that he uttered any word at the time of the occurrence. Needless to say that to bring home the guilt of an accused for an abetment of an offence, the prosecution has to necessarily prove active and intentional instigation. The Court may hasten to say that in the instant case, the prosecution has not proved the same to hold that the second appellant has abetted the offence. Much reliance was placed by the prosecution on the recovery of M.O.2 knife from A-2 under Ex.P8 mahazar, pursuant to a confessional statement given by him to the Investigation Officer in the presence of P.W.6 Village Administrative Officer and another. A very reading of the admissible portion of the said confessional statement, marked as Ex.P7 and the description of A-2 under Ex.P8 mahazar would indicate that the confessional statement should have been mechanically written by the police official and could not have been one given by the second appellant/A-2. Even according to the prosecution, A-2 was holding a knife, but never used the same. The confessional statement would read as if M.O.2 knife was used by him at the time of occurrence, which was not the factual position, and hence, neither the alleged confession nor the recovery pursuant thereon would be of any help to the prosecution. Under such circumstances, it would be unsafe to hold that A-2 committed the abetment, as

alleged by the prosecution. Hence, the judgment of the court below finding him guilty under S.302 read with S.109 of Indian Penal Code has got to be set aside, and the second appellant/A-2 be acquitted of the charges.

16. In the result, this criminal appeal is dismissed as against the first appellant/A-1, confirming the conviction and sentence imposed on him by the court below. As regards the second appellant/A-2, this criminal appeal is allowed, setting aside the judgment of the court below. The second appellant/A-2 is acquitted of the charges against him forthwith. The bail bond executed by the second appellant, if any, shall stand cancelled. If the first appellant/A-1 is on bail, the learned Additional Sessions Judge shall take steps to commit him to prison to undergo the remaining period of sentence.

P.SHANMUGAM, J.
AND
M.CHOCKALINGAM, J.

Index: Yes
Internet: Yes

To:
1) The District Additional Sessions Judge, Tirunelveli.
2) The District Additional Sessions Judge, Tirunelveli,
through The Principal Sessions Judge, Tirunelveli.
3) The District Collector, Tirunelveli.
4) The Director General of Police, Chennai 4.
5) The Public Prosecutor, Madras.
6) The Superintendent, Central Prison, Palayamkottai.
7) The Judicial Magistrate, Cheranmahadevi,
Tirunelveli Kattabomman District.
8) The Judicial Magistrate, Cheranmahadevi,
Tirunelveli Kattabomman District,
through The Chief Judicial Magistrate, Tirunelveli.
9) The Sub Inspector of Police, Cheranmahadevi Police
Station, Tirunelveli Kattabomman District.

Judgment in
C.A.No.40 of 1995

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